Supreme Court, U.S.
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No. 98-1339

In The

Supreme Court of the United States

October Term, 1998

M. JOE HERWINS,

Petitioner,

v.

THE CITY OF REVERE AND JAMES J. MAROTTA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether An Emergency Closure of a Building Effected Contrary to Established State Procedures Constitutes a Violation of the Procedural Due Process Rights of the Property Owner Where the State Provides an Adequate Post-Deprivation Remedy To Correct the Error?

2. Whether the Failure to Give Notice of a Right to Appeal As Required Under Published State Regulations After an Emergency Closure of a Building Rises to the Level of a Procedural Due Process Violation?

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STATEMENT OF THE CASE

The Court of Appeals, and not Petitioner, properly summarized the facts of this case. As set forth in the Court of Appeals' decision, this case arises from the action of a health inspector for the Respondent City of Revere ("Revere") in declaring a building unfit for human habitation. (Appendix to Petition ("App.") A2). Respondent James J. Marotta ("Marotta"), a health inspector for Revere, took this action because Petitioner M. Joe Herwins' ("Herwins") building was not properly heated, and lodgers were using gas stoves to provide heat in the middle of a New England winter. App. A2.

Herwins' property, located at 53A Walnut Avenue in Revere, Massachusetts, was a three story building, with rooms rented to members of the public. App. A2. On the morning of February 24, 1993, a complaint was lodged with the Revere Board of Health and the Boston Gas Company, regarding the smell of gas at the property. App. A2.

After the call, a Boston Gas representative and Marotta went to 53A Walnut Avenue to investigate. Marotta was the housing code inspector in Revere at the time, and was responsible for investigating complaints pertaining to the condition of housing units in the City. After inspection, they found that a resident had been using a gas stove to provide heat for his unit and this use had generated the strong odor of gas. Marotta concluded that there was no heat in the building after his inspection, and he reported his findings to his superior, the health agent. App. A2. Based upon the instructions from the health agent, Marotta returned to 53A Walnut Avenue later in

the day, along with other City officials from the Building Department, the Fire Department, as well as the Board of Health, to conduct a full scale inspection of the property. App. A2.

Based upon these inspections, Marotta and another inspector drafted a letter to Herwins which included a listing of violations of the State Sanitary Code. In the ultimate finding of the letter, Marotta and the other health inspector concluded that "Pursuant to 105 CMR 410.750, the above conditions are deemed to endanger and impair the health, safety and well-being of persons occupying the premises. In accordance with 105 CMR 410.831(D), the Revere Health Department has determined that due to the nature and severity of the violations found, danger to the premise's occupants is immediate and thus issues a finding that the occupied dwelling is unfit for human habitation and must be vacated forthwith." App. A2. Although the letter called for the building to be vacated, it did not notify Herwins that he had a right to appeal this determination to the Board of Health, as set forth in 105 CMR 400.832. App. A4.

Marotta served this letter upon Herwins and the occupants of 53A Walnut Avenue, and the tenants vacated the building shortly thereafter. App. A3. Herwins then drained the heating system for the building, but did nothing further with respect to the letter, either by way of an appeal to the Board of Health or to the Courts of the Commonwealth of Massachusetts. App. A10.

In October of 1993, Herwins, along with his counsel, met with Revere officials regarding his use of 53A Walnut

Avenue. App. A3. Herwins sought the meeting to determine what he had to do in order to reopen the property. At the meeting, the plumbing inspector for Revere told Herwins that, if he wanted to rent the units as apartments, that he had to have sanitary facilities for each unit. Previously, the second floor units, along with a unit on the third floor, shared a common bathroom on the second floor. Herwins, upon hearing this requirement, abruptly terminated the meeting, and took an appeal from the plumbing inspector's determination to the Board of State Examiners of Plumbers and Gas Fitters. App. A3.

After hearing, the State Board upheld the decision of the Revere plumbing inspector, and voted to deny Herwins' appeal on May 4, 1994. App. A3. Herwins sought no judicial review of the decision of the State Board, and took no further action with regard to 53A Walnut Avenue. Instead, the building remained unoccupied up to and including the time of trial. On November 2, 1995, Herwins commenced this action in the United States District Court for the District of Massachusetts to seek a determination that his constitutional rights to procedural due process had been violated in the course of the closing of his building. App. A3.

Herwins' complaint contained two counts, both limited to procedural due process claims. Count One alleged that the closure of his building without prior notice or hearing violated his procedural due process rights. Count Two claimed that the failure to notify Herwins of his right to appeal after the closure of the building constituted a separate procedural due process violation. App. A4. Revere and Marotta sought summary judgment on both claims, but the Trial Judge denied the motions. App. A4.

After trial, and a jury verdict in favor of Herwins against both Marotta and Revere, the Trial Judge set aside the verdict against Revere on Count One, and directed a verdict for both Revere and Marotta on Count Two. App. A5. On appeal, the Court of Appeals agreed with the Trial Judge's disposition as to Revere, but vacated the judgment as to Marotta. The Court of Appeals concluded that Herwins had failed to establish any violation of a constitutional dimension and directed the entry of judgment for both Revere and Marotta. Herwins' petition for a writ of certiorari now attempts to bring this matter to this Court.

REASONS FOR DENYING THE PETITION

This case raises pedestrian issues of procedural due process rights that this Court settled long ago. To deal with these issues, this Court has developed clear principles that have been faithfully applied in the circuits. Accordingly, to grant certiorari in this case would result in a restatement of settled law, of little benefit beyond the parties to this suit. The scarce resources of this Court should not be devoted to matters of such limited utility.

Herwins raises two issues in this Court. His first issue is whether there is a violation of procedural due process if an official abuses emergency procedures notwithstanding the availability or efficacy of post-deprivation remedies. His second issue is whether the failure of an official to provide notification of a right to appeal similarly violates procedural due process protections, even though state law may mandate such notice. The prior decisions of this Court have clearly held that there

is no violation of constitutional dimension in these circumstances, and there is no conflict among the circuits with regard to either issue.

I. A Violation of Established State Procedures Does Not Violate Procedural Due Process if the State Provides an Adequate Remedy to Redress the Deprivation.

As the Court of Appeals noted, this Court has clearly articulated the standards that must be met in order to establish a procedural due process violation. First, it is clear that a deprivation, standing alone, does not result in a due process violation. As this Court explained in *Parratt v. Taylor*, 451 U.S. 527, 536-537 (1981):

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of Law." Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process.

The *Parratt* Court concluded that the State could not practicably provide pre-deprivation process in the circumstances of the case. Accordingly, if the State provided adequate post-deprivation remedies, there could be no violation of procedural due process rights.

The rule in *Parratt* was extended to encompass intentional deprivations in *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). In *Hudson*, 468 U.S. at 533, the Court explained the principle as follows:

> If negligent deprivations of property do not violate the Due Process Clause because predeprivation process is impracticable, it follows that intentional deprivations do not violate that Clause provided, of course, that adequate state post-deprivation remedies are available. Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy.

The principles articulated in *Parratt* and *Hudson* were not applicable to the cases in which the deprivations were the result of the application of "established state procedures" as opposed to "random" or "unauthorized" conduct of public officials. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-436 (1982). If the use of an "established state procedure" destroys an entitlement without

the safeguards required by the Due Process Clause, then the official may be held liable for a due process violation. *See also Zinermon v. Burch*, 494 U.S. 113, 135-139 (1990).

As the Court of Appeals noted, these principles controlled the outcome of this case. In an emergency, the Massachusetts regulations properly allowed for action without a hearing. *See Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 299-300 (1981). If the conditions at Herwins' property did not constitute a true emergency – a "danger to the life or health of the occupant(s) . . . so immediate that no delay may be permitted" – the regulations provided no authority to Marotta to declare an emergency. 105 CMR 410.831(D). App. A17. Accordingly, if Marotta deliberately or recklessly declared an emergency where none existed, his actions were unauthorized, and the only feasible remedy was a post-deprivation hearing, which Massachusetts provided under the State Sanitary Code. *See* 105 CMR 400.200(B)(1). App. A15. Since the post-deprivation procedure provided an adequate remedy, there was no deprivation of property without due process.

Notwithstanding Herwins' assertion to the contrary, there is no split among the circuits as to the meaning or applicability of *Parratt, Hudson, Logan* and *Zinermon*. Rather, the circuits have consistently and uniformly applied these principles in a variety of contexts. For example, the Second Circuit Court of Appeals dismissed an action by a contractor who had been debarred from bidding upon City contracts, allegedly in violation of the contractor's rights to procedural due process. *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880-881 (2d Cir. 1996). The Second

Circuit held that no constitutional claim was available where there were state law remedies that could have corrected the claimed deprivation. The Sixth, Seventh and Eleventh Circuits are also in agreement with this analysis. *See Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994); *Easter House v. Felder*, 910 F.2d 1387, 1404 (7th Cir. 1990); *Nance v. Vieregge*, 147 F.3d 589, 591 (7th Cir. 1998); *McKinney v. Pate*, 20 F.3d 1550, 1562-1563 (11th Cir. 1994); *Powell v. Georgia Dept. Of Human Resources*, 114 F.3d 1074, 1080-1082 (11th Cir. 1997).

The sole case that Herwins cites, *Armendariz v. Penman*, 31 F.3d 860 (9th Cir. 1994), is not to the contrary. In *Armendariz*, the Court noted that the State could provide no pre-deprivation process if the deprivation was the result of a random and unauthorized act. The Court concluded, however, that the actions taken or directed by the Mayor, City Attorney and other supervisory officials were taken under the apparent authority of state procedures, statutes and regulations and so *Parratt* did not apply. *Armendariz, supra*, 31 F.3d at 866. As with *Zinermon v. Burch*, 494 U.S. 113 (1990), *Armendariz* involved no official action contrary to established state procedures. Accordingly, when the officials utilized flawed procedures, they could be held liable for a due process violation.

This brief review of the applicable authorities demonstrates that this Court has generated a well-developed and carefully articulated body of law pertaining to procedural due process. The Court of Appeals in this case correctly applied these clear precedents. There is simply no need for this Court to revisit principles that have been

clearly established for almost twenty years. This Court should deny Herwins' petition on this ground.

II. Marotta's Failure to Notify Herwins of his Right to a Hearing In Violation of State Law Requirements Raises No Due Process Issue

The same principles of due process outlined above dispose of Herwins' second claim regarding the lack of notice of his right to appeal. According to Herwins, Marotta's failure to notify him that he had a right of appeal to the Board of Health violated his rights to procedural due process. As the Court of Appeals noted, Herwins' argument confuses a state law violation with a constitutional claim.

There was no flaw in the Massachusetts regulatory scheme. As Herwins notes, the State Sanitary Code required the code inspector (Marotta) to notify Herwins of his hearing rights, including the procedure for requesting a hearing, the deadline for such a request, the right to inspect the documents in the possession of the Board of Health, and the right to appear personally at the hearing and be represented by counsel. *See* 105 CMR 410.832(b)(2). App. A18. Any deviation from these procedures was unauthorized, and therefore, for due process purposes, any violation was not complete unless and until the State failed to afford appropriate post-deprivation remedies.

This essential distinction differentiates this case from *Wilson v. The Health and Hospital Corporation of Marion County*, 620 F.2d 1201 (7th Cir. 1980) on which Herwins relies. In *Wilson*, the statutory scheme provided for no notice at all, with the officials relying solely on the public

nature of the ordinance as their notice to the affected individuals. Accordingly, the flaw in *Wilson* was with the established state procedures, not with any unauthorized deviation from these procedures.

Where an official deviates from established state procedures, the inquiry then shifts to whether the state provides adequate post-deprivation remedies. As the Court of Appeals held, Massachusetts adequately provides for post-deprivation remedies where the local official fails to provide proper notice of the right to appeal. If Herwins could not have filed his appeal within the seven-day time limit because of lack of notice, he could have pursued a late filed appeal based upon the equitable principles adopted in Massachusetts. Under Massachusetts law, equitable tolling is available to preserve rights lost if the claimant is excusably ignorant regarding the deadline or is affirmatively misled by his adversaries. *See Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021, 1022, 673 N.E.2d 40 (1996) and cases cited. If the fact pattern in this case fit one of the exceptions, Herwins could have pursued his administrative appeal, notwithstanding the short deadline contained in the State Sanitary Code. If Herwins was not entitled to invoke the doctrine of equitable tolling, then it cannot be said that the State failed to provide him with an appropriate remedy, but only that Herwins failed to avail himself of the existing remedies to correct the errors. The Court of Appeals so held in this case, and their holding on a matter of state law is binding on Herwins.

Even if Massachusetts state law had not provided for notice, this Court has already determined that such notice

is not constitutionally required where notice of state mandated remedies is available in published, commonly distributed sources. *City of West Covina v. Perkins*, 525 U.S. ___, 119 S.Ct. ___, 142 L.Ed.2d 636 (1999). Herwins' attempts to distinguish *West Covina* are unpersuasive. Where, as here, notice of post-deprivation remedies were generally available to the public in the Code of Massachusetts Regulations, further notice was not mandated by the Due Process Clause.

In the final analysis, the Court of Appeals aptly summarized this case in its concluding remarks. As the Court of Appeals stated,

> When one steps back, Herwins plainly could have taken an immediate appeal on the emergency shutdown and shown that the heat had been turned back on and that the other violations were not threatening to health. This would have meant a brief inconvenience to Herwins and the tenants but it would likely have led to a prompt cancellation of the emergency closure. The idea that Herwins could ignore this state provided procedural remedy, and then create a federal case and collect $55,000 damages for a denial of procedural due process, just makes no sense.

Marotta's failure to follow state mandated requirements for notifying Herwins of his right to a hearing raises no substantial constitutional questions. This Court should decline to grant the writ on this issue.

CONCLUSION

The only constitutional questions raised in his petition set forth procedural due process issues that have long been settled by this Court. There is no conflict among the circuits concerning these principles, and the Court of Appeals in this case properly applied these principles. Accordingly, there is no basis upon which this Court should grant certiorari and this Court should deny Herwins' petition.

Respectfully submitted,

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